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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

DANIEL PONCE QUIROZ,

Defendant and Appellant.

F076537

(Super. Ct. No. F17904037)

**OPINION**

**THE COURT\***

APPEAL from a judgment of the Superior Court of Fresno County. Jonathan B. Conklin, Judge.

Erin J. Radekin, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Louis M. Vasquez, Amanda D. Cary, and Lewis A. Martinez, Deputy Attorneys General, for Defendant and Respondent.

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\* Before Levy, Acting P.J., Poochigian, J. and DeSantos, J.

## **INTRODUCTION**

Appellant Daniel Ponce Quiroz stands convicted of stalking with a restraining order in effect, in violation of Penal Code<sup>1</sup> section 646.9, subdivision (b) (count 3); misdemeanor domestic battery, in violation of section 243, subdivision (e)(1) (count 4); felony criminal contempt, in violation of section 166, subdivision (c)(4) (count 5); and misdemeanor criminal contempt, in violation of section 166, subdivision (c)(1) (counts 6 & 7).

Quiroz contends the count 6 conviction must be vacated because it is based upon the same conduct as the count 5 offense. He also contends the sentence imposed for the count 4, 5, and 7 offenses should be stayed pursuant to section 654. Lastly, Quiroz contends the abstract of judgment must be corrected.

We reject his contention that section 654 bars imposition of punishment for the count 4, 5, and 7 offenses. We vacate the count 6 conviction. In all other respects, we affirm the judgment and direct the trial court to prepare a corrected abstract of judgment.

## **FACTUAL AND PROCEDURAL SUMMARY**

Sara Reyes Vasquez had been married to Quiroz for nine years. They were raising three girls together, one of whom was Quiroz's biological daughter. In November 2016, Quiroz moved out of the family home; Vasquez was "really furious" that he was using drugs, specifically "crystal" methamphetamine. Quiroz started becoming violent toward her after he began using drugs.

In one incident, Quiroz slapped Vasquez in the face. She subsequently obtained a protective order against him that prevented him from coming to the house. After the protective order was in place, if Quiroz came to the house, Vasquez called the police.

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<sup>1</sup> References to code sections are to the Penal Code.

Quiroz was convicted of violating section 236, false imprisonment, as a result of an incident on December 11, 2016, involving Vasquez.

On May 8, 2017, Quiroz came to the house and confronted Vasquez. He was angry because he believed Vasquez was dating another man. Quiroz told her when he found out who the man was, he would kill him. Vasquez called the police and reported the incident. Quiroz was convicted of violating a criminal protective order, a violation of section 166, subdivision (c)(1).

On July 10, 2017, Vasquez headed home from her sister's house, but when she arrived she could not open her door. She heard a noise inside and called police. Vasquez thought Quiroz was inside her home. Officers arrived and told Vasquez to stay in her car and not go near the house. At some point they told her she could return to the house and she found the locks had been damaged.

On the morning of July 11, 2017, Vasquez was home with her eldest daughter. Vasquez heard a noise like glass breaking. She went toward the sound; saw a window was broken; and saw Quiroz standing in the backyard right outside the broken window. Vasquez yelled out to her daughter to call the police. Quiroz sounded irritated when he told her, "this is my house" and then fled. Vasquez went to get the phone from her daughter, so she could talk to the 911 operator.

Fresno Police Officer Gary Holden was dispatched to Vasquez's residence in response to the 911 call. He took statements from Vasquez and her daughter. Holden saw that the window of the master bedroom had been broken from the outside. He was unable to locate Quiroz at that time.

Later that morning, Vasquez was outside watering plants at the front of the house when Quiroz rode up on her daughter's bicycle. She told him to leave. Instead, Quiroz grabbed her and pushed her. Vasquez's eldest daughter heard Quiroz, so she fled to the garage and waited by the car.

After Quiroz pushed her into the house, Vasquez backed up toward her bedroom. She turned and walked into the bedroom to get her phone and call the police. Quiroz followed her into the bedroom, bumped into her, and said, “What are you doing?” Quiroz tried to slap Vasquez twice; she blocked the first attempt, but he connected with her face on the second attempt.

Vasquez told Quiroz she was calling the police and she did. Quiroz fled through the front door and rode away on the bicycle; Vasquez followed in her car, so she could tell the police his location. Holden contacted Vasquez as she was in her car. She had lost sight of Quiroz, but she provided Holden with a description of him and the bicycle.

Holden located Quiroz and the bicycle and placed him under arrest. He then took a second statement from Vasquez.

On September 21, 2017, Quiroz was charged in count 1 with residential burglary, in violation of sections 459/460, subdivision (a); in count 2 with false imprisonment by violence, in violation of section 236; in count 3 with stalking when a restraining order is in effect, in violation of section 646.9, subdivision (b); in count 4 with spousal battery, in violation of section 243, subdivision (e)(1); in count 5 with a violation of a protective order with a prior conviction within seven years of July 11, 2017, in violation of section 166, subdivision (c)(4); in counts 6 and 7, on July 11, 2017, with a violation of a protective order issued as a condition of probation, in violation of section 166, subdivision (c)(1); and in count 8, on July 10, 2017, with a violation of a protective order issued as a condition of probation, in violation of section 166, subdivision (c)(1). In addition, it was alleged Quiroz had suffered a prior serious felony or strike conviction.

The jury found Quiroz not guilty of counts 1, 2, and 8. The jury found him guilty of counts 3 through 7. Quiroz admitted the prior strike allegation.

At the November 2, 2017 sentencing hearing, the trial court imposed the upper term of four years for count 3, the stalking conviction, with a concurrent term of

two years eight months for the count 5 conviction. The trial court awarded credits totaling 229 days and ordered that Quiroz be sentenced to time served on the misdemeanor counts. Various fines and fees were imposed.

Quiroz filed a timely notice of appeal on November 3, 2017.

### **DISCUSSION**

Quiroz contends the count 6 conviction must be vacated because it is based upon the same conduct as the count 5 offense. The People concede this issue. He also contends the sentence imposed for the count 4, 5, and 7 offenses should be stayed pursuant to section 654. Lastly, Quiroz contends the abstract of judgment must be corrected.

#### **I. Count 6 Must be Vacated**

At closing argument, the prosecutor stated that count 6 was charged in the alternative to count 5. Both counts referred to the second incident on July 11, 2017, when Quiroz arrived at Vasquez's home. Quiroz contends the count 6 conviction must be vacated because it is a necessarily included offense of the count 5 offense.

Multiple convictions may not be based upon necessarily included offenses. (*People v. Flores* (2005) 129 Cal.App.4th 174, 184 (*Flores*).) Where an offense cannot be committed without necessarily committing another, the latter is a necessarily included offense. (*Ibid.*)

Count 6 is a violation of section 166, subdivision (c)(1). Section 166, subdivision (c)(1) is the crime of violating a protective order. Count 5 is a conviction for violating section 166, subdivision (c)(4), which describes the offense as a second or subsequent conviction for a violation of section 166, subdivision (c)(1), within seven years of a prior conviction for violating the protective order, and involving a credible threat of violence.

Accordingly, section 166, subdivision (c)(4) cannot be violated without also violating section 166, subdivision (c)(1), making the latter offense a necessarily included offense. (*Flores, supra*, 129 Cal.App.4th at p. 184.) Because both convictions are based upon the second July 11, 2017 incident, and the count 6 offense is necessarily included in the count 5 offense, the count 6 conviction must be vacated. (*Ibid.*)

## **II. Section 654**

Quiroz contends the terms imposed for counts 4, 5, and 7 should have been stayed pursuant to section 654.

### ***Standard of Review***

A substantial evidence standard of review is used to analyze the trial court's implied findings that a defendant held a separate intent and objective for each offense. (*People v. Dowdell* (2014) 227 Cal.App.4th 1388, 1414 (*Dowdell*).) It is generally a factual matter whether the facts and circumstances reveal a single intent and objective within the meaning of section 654. (*Dowdell*, at p. 1414.) We are to review the trial court's findings in the light most favorable to the court's ruling and we are to presume the existence of every fact reasonably deduced from the trial evidence. (*People v. Green* (1996) 50 Cal.App.4th 1076, 1085.)

### ***Section 654 Provisions***

Section 654 bars the imposition of multiple sentences for a single act or omission, even though the act or omission may violate more than one provision of the Penal Code. (*People v. Mesa* (2012) 54 Cal.4th 191, 195.) This is true even if the trial court imposes multiple concurrent sentences. (*People v. Jones* (2012) 54 Cal.4th 350, 353.) The appropriate procedure is to sentence a defendant for each count and stay execution of sentence for those convictions which fall under section 654. (*Dowdell, supra*, 227 Cal.App.4th at pp. 1413–1414.) The goal is to ensure that punishment is commensurate with criminal liability. (*Dowdell*, at p. 1414.)

Section 654 applies when a defendant's course of conduct violated more than one statute but represented an indivisible transaction. (*Dowdell, supra*, 227 Cal.App.4th at p. 1414.) The issue centers on the defendant's intent and objective. (*Ibid.*) If all the offenses were incident to one objective, the defendant may not be punished more than once. (*Ibid.*) However, if the defendant had multiple criminal objectives which were independent of and not merely incidental to each other, multiple punishment is appropriate even though the violations were part of an otherwise indivisible course of conduct. (*Ibid.*)

### ***Count 5***

Quiroz contends the term imposed for the count 5 offense should be stayed pursuant to section 654 because the count 5 contempt offense is based upon the same acts that constitute the count 3 stalking offense. Although the trial court followed the sentencing recommendations in the probation report, and Quiroz raised no objection to the probation report or sentence on the grounds it violated section 654, he is not precluded from raising this issue on appeal. (*People v. Hester* (2000) 22 Cal.4th 290, 295.)

The issue of lesser included offenses arises because of the tension between sections 954 and 654. Section 954 provides that an accusatory pleading may charge different statements of the same offense, and the defendant may be convicted of "any number of the offenses charged." Section 654, subdivision (a) provides that while a defendant may be convicted of any number of offenses charged, he or she may be sentenced only once for each criminal act.

"In *People v. Pearson* (1986) 42 Cal.3d 351, 359, we recognized the tension between these statutes, observing: 'This court has long struggled with the problem of permitting multiple convictions while protecting the defendant from multiple punishment.' The solution we have adopted is, in general, to permit multiple convictions on counts that arise from a single

act or course of conduct—but to avoid multiple punishment, by staying execution of sentence on all but one of those convictions. [Citation.]

“But despite the seemingly absolute language of section 954 (‘the defendant may be convicted of any number of the offenses charged’), there is an exception to the general rule permitting multiple convictions. ‘Although the reason for the rule is unclear, this court has long held that multiple convictions may *not* be based on necessarily included offenses. [Citations.]’ [Citation.] ‘ “The test in this state of a necessarily included offense is simply that where an offense cannot be committed without necessarily committing another offense, the latter is a necessarily included offense.” ’ ” (*People v. Ortega* (1998) 19 Cal.4th 686, 692, overruled on other grounds in *People v. Reed* (2006) 38 Cal.4th 1224, 1229.)

The test in *Ortega* is commonly referred to as the elements test. “The elements test is satisfied when ‘ “all the legal ingredients of the corpus delicti of the lesser offense [are] included in the elements of the greater offense.” [Citation.]’ [Citations.] Stated differently, if a crime cannot be committed without also necessarily committing a lesser offense, the latter is a lesser included offense within the former.” (*People v. Lopez* (1998) 19 Cal.4th 282, 288.) A defendant cannot be convicted of a necessarily included offense that meets the elements test. (*People v. Ramirez* (2009) 45 Cal.4th 980, 985.) “Under the ‘elements’ test, we look strictly to the statutory elements, not to the specific facts of a given case. [Citation.] We inquire whether all the statutory elements of the lesser offense are included within those of the greater offense.” (*Ibid.*)

The elements the prosecution must prove when a defendant is charged with stalking<sup>2</sup> are: (1) The defendant willfully and maliciously harassed or willfully,

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<sup>2</sup> Section 646.9, subdivisions (a) through (c) state: “(a) Any person who willfully, maliciously, and repeatedly follows or willfully and maliciously harasses another person and who makes a credible threat with the intent to place that person in reasonable fear for his or her safety, or the safety of his or her immediate family is guilty of the crime of stalking, punishable by imprisonment in a county jail for not more than one year, or by a fine of not more than one thousand dollars (\$1,000), or by both that fine and imprisonment, or by imprisonment in the state prison. [¶] (b) Any person who violates subdivision (a) when there is a temporary restraining order, injunction, or any other court



maliciously, and repeatedly followed another person; (2) the defendant made a credible threat with the intent to place the other person in reasonable fear for his or her safety or for the safety of his or her immediate family; and (3) the defendant's conduct was not constitutionally protected. (CALCRIM No. 1301; § 646.9, subd. (a).)

The elements the prosecution must prove when a defendant is charged with violation of a court order are: (1) a court lawfully issued a written order; (2) the defendant knew about the court order and its contents; (3) the defendant had the ability to follow the court order; and (4) the defendant willfully violated the court order. (CALCRIM No. 2700; § 166, subd. (a)(4).)

The offenses of stalking and violating a protective order were addressed in *People v. Muhammad* (2007) 157 Cal.App.4th 484 (*Muhammad*), where the defendant was convicted of four counts of stalking based on the same set of facts. The appellate court addressed the issue:

“In resolving this dispute, we find *People v. Kelley* (1997) 52 Cal.App.4th 568, instructive. In *Kelley*, the defendant, who previously had been prosecuted and convicted of misdemeanor contempt (§ 166, subd. (a)(4)) for violating a restraining order, was charged with stalking in violation of the same restraining order under section 646.9(b). (*Kelley*, at pp. 574–575.) As *Kelley* explained, the double jeopardy clause of the Fifth Amendment prohibits a person from being prosecuted twice for the same offense or any included offense, and the test is whether each offense contains an element the other does not. (*Kelley*, at p. 576.) The defendant argued that his prosecution for stalking violated the prohibition against

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order in effect prohibiting the behavior described in subdivision (a) against the same party, shall be punished by imprisonment in the state prison for two, three, or four years.

[¶] (c)(1) Every person who, after having been convicted of a felony under Section 273.5, 273.6, or 422, commits a violation of subdivision (a) shall be punished by imprisonment in a county jail for not more than one year, or by a fine of not more than one thousand dollars (\$1,000), or by both that fine and imprisonment, or by imprisonment in the state prison for two, three, or five years. [¶] (2) Every person who, after having been convicted of a felony under subdivision (a), commits a violation of this section shall be punished by imprisonment in the state prison for two, three, or five years.”

double jeopardy because the crime of stalking in violation of a restraining order contains all the elements of the crime of contempt for violating that restraining order. (*Ibid.*) In rejecting the argument, the court stated, ‘In making this argument, [the defendant] incorrectly assumes section 646.9 defines the crime of stalking in violation of a restraining order. The section merely defines stalking. The provisions relating to the violation of a restraining order do not define a crime. They merely create a punishment enhancement. As such, they are not to be considered in the double jeopardy analysis. [Citation.] Absent these provisions, the crimes are distinct and the constitutional prohibition against double jeopardy was not violated.’ (*Kelley*, at p. 576, fn. omitted.)” (*Muhammad, supra*, 157 Cal.App.4th at pp. 490–491.)

It is obvious that a defendant can be convicted of stalking without a temporary restraining order or other court order being in place. Accordingly, the crime of stalking can be committed without also violating a court order. Therefore, violation of a court order is not a lesser included offense of stalking.

In this case, Quiroz was charged with stalking while a court order was in effect pursuant to subdivision (b) of section 646.9, which increased the punishment for a violation of subdivision (a) of section 646.9. Specifically, the crime no longer was a wobbler but a felony. Subdivision (b) of section 646.9, however, did not create a new crime. It is a penalty provision that is separate from the underlying offense. (*Muhammad, supra*, 157 Cal.App.4th at pp. 492-494.) A penalty provision is not an element of the crime. (*Ibid.*) Therefore, violating a court order and stalking have different elements, and one cannot be a lesser included offense of the other.

Consequently, section 654 does not bar punishment for both the section 166 and 646.9 offenses.

#### ***Count 4***

Quiroz makes the same argument with respect to count 4 (misdemeanor battery) and argues the term imposed for this count must be stayed pursuant to section 654 for the same reasons as count 5 must be stayed, that it is based upon the same acts as the stalking conviction in count 3. We reject Quiroz’s contention.

Battery is the “willful and unlawful use of force or violence upon the person of another.” (§ 242; *People v. Shockley* (2013) 58 Cal.4th 400, 404.) The objective of a battery is to immediately physically harm and injure. One need not inflict physical harm on another person or damage to property to stalk a victim. (*People v. Ewing* (1999) 76 Cal.App.4th 199, 210.) The trial court reasonably could find the battery was independent of and not incidental to Quiroz’s stalking behavior. (*People v. Beamon* (1973) 8 Cal.3d 625, 639.) Consequently, the trial court did not err in imposing punishment for the count 4 conviction.

### ***Count 7***

Quiroz contends the punishment imposed for the count 7 conviction for a misdemeanor violation of section 166, subdivision (c)(1) must be stayed because the same acts constituting the count 7 offense are the same acts that constitute part of the count 3 stalking offense and conviction.

For the reasons set forth in our analysis of Quiroz’s contention that the punishment imposed for the count 5 offense, a violation of section 166, subdivision (a)(4), should not be stayed pursuant to section 654 because of imposition of punishment for the count 3 stalking conviction, we similarly conclude that punishment for the count 7 conviction for a misdemeanor violation of section 166, subdivision (c)(1) should not be stayed pursuant to section 654.

### **III. Abstract of Judgment**

The trial court imposed the low term of two years for the count 3 conviction, doubled to four years as a result of Quiroz’s prior strike conviction. The minute order and abstract of judgment incorrectly reflect that the upper term was imposed on count 3. The oral pronouncement of judgment is controlling. (*People v. Zackery* (2007) 147 Cal.App.4th 380, 389.)

We will direct the trial court to prepare a corrected abstract of judgment.

### **DISPOSITION**

The count 6 conviction is vacated. In all other respects, the judgment is affirmed. The trial court is directed to prepare a corrected abstract of judgment consistent with this opinion and to disseminate the same to the appropriate authorities.